

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

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**JAN 6 1997**  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY  
CC Docket No. 96-238

**In the Matter of**

**Implementation of the  
Telecommunications Act of 1996**

**Amendment of Rules Governing  
Procedures to Be Followed When  
Formal Complaints Are Filed Against  
Common Carriers**

**COMMENTS OF SOUTHWESTERN BELL TELEPHONE COMPANY**

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**January 6, 1997**

COMMENT OF SOUTHWESTERN BELL TELEPHONE COMPANY

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## SUMMARY\*

In general, SWBT supports the Commission's efforts to streamline the formal complaint process. Specifically, SWBT supports the proposal that formal complaints be required to include supporting documentation, detailed allegations of alleged violations of the Communications Act, proposed findings of facts and conclusions of law, and lists of witnesses and relevant documents.

SWBT does not support the proposal that defendants' answers include complete lists of witnesses and relevant documents. Complainants have months or even years to prepare their initial pleading and can also choose the appropriate time for filing. Defendants, on the other hand, would have only 20 days, under the proposed new rules, to file their answers. Twenty days is simply not enough time, in a complex case, for a defendant to prepare a complete list of witnesses and relevant documents. SWBT would support a modified proposal to allow defendants to update lists of witnesses and relevant documents as the case progresses.

Abuse of discovery, more than anything else, causes inordinant delays in the processing of formal complaints. SWBT urges the Commission to seriously consider either prohibiting discovery entirely in formal complaints, or else requiring the parties to engage in self-executing discovery prior to the filing of the complaint. The adoption of either of these proposals would go far to helping the Commission meet its statutory deadlines under the Telecommunications Act of 1996.

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\* All abbreviations used herein are referenced within the text.

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**COMMENTS OF SOUTHWESTERN BELL TELEPHONE COMPANY**

Southwestern Bell Telephone Company (SWBT) hereby files these comments generally in support of the Commission's suggestions for amending the formal complaint procedures. Accelerating the processing of formal complaints will benefit complainants, defendants, the Commission and the public.

I. **PRE-FILING PROCEDURES AND ACTIVITIES**

The Commission proposes that all complainants certify that they have discussed, or attempted to discuss, the possibility of good faith settlement with the defendant(s).<sup>1</sup> Failure to comply with such certification would result in dismissal of the complaint. In the recent past, SWBT

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<sup>1</sup> In the Matter of Implementation of the Telecommunications Act of 1996, the Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers; Notice of Proposed Rulemaking; CC Docket No. 96-238 (released November 27, 1996) (NPRM) at para 28.

has settled several matters which, absent settlement discussions, might have been filed as formal complaints. Dialogues between parties could significantly reduce the number of formal complaints filed.

SWBT also supports the suggestion that outside experts be employed to address technical issues.<sup>2</sup> Formal complaints are often highly technical. A neutral industry body composed of subject matter experts could greatly aid the Enforcement Division in the quick resolution of disputes. Such body must be truly neutral, however, and must be large enough to avoid conflicts of interest. SWBT suggests that three-person panels be selected for those formal complaints involving technical questions beyond the general expertise of Commission staff. One expert could be selected by complainant(s), one by defendant(s), and one by the Commission itself.

## II. SERVICE

SWBT supports the proposal that the complainant serve process simultaneously on the Commission, the Commission staff and the defendant(s).<sup>3</sup> The current practice in which complainant serves process upon the Commission, and the Commission in turn serves process upon the defendant(s), leads to inordinate and unnecessary delay. SWBT also supports the proposal that service be obtained upon designated agents of the defendant(s).<sup>4</sup> Service by certified mail should also be allowed. Finally, SWBT also supports the proposal that, after defendant(s) has/have been

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<sup>2</sup> Id. at para. 29.

<sup>3</sup> Id. at para. 31.

<sup>4</sup> Id.

served, parties serve all subsequent pleadings by overnight delivery and/or facsimile, to be followed by regular mail delivery.<sup>5</sup> Because the parties involved in formal complaints are often separated by large distances, service of pleadings through the regular mail often slows matters by many days.

### III. FORMAT AND CONTENT REQUIREMENTS

The Commission proposes that formal complaints be required to include the following:

1. Documents supporting underlying allegations and request for relief;<sup>6</sup>
2. Detailed explanation of the manner in which a defendant has allegedly violated the Communications Act, Commission Order, or Commission rule;<sup>7</sup>
3. Proposed findings of fact and conclusions of law with supporting legal analysis;<sup>8</sup>
4. Name, address and telephone number of each individual likely to have discoverable information relevant to the disputed facts, with identification of each individual's area of knowledge;<sup>9</sup>
5. A copy of, or description by category, and location of all documents, data compilations and tangible things relevant to the disputed facts;<sup>10</sup>
6. Copies of all relevant tariffs.<sup>11</sup>

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<sup>5</sup> Id. at para. 35.

<sup>6</sup> Id. at para. 39.

<sup>7</sup> Id. at para. 40.

<sup>8</sup> Id. at para. 41.

<sup>9</sup> Id. at para. 43.

<sup>10</sup> Id.

<sup>11</sup> Id. at para. 45.

SWBT supports all of the above proposals. One of the great difficulties in defending a formal complaint is discovering the nature of complainant's claim and supporting documentation. Under the current procedure, defendants typically do not truly know what the case is about until complainant files its brief in chief. The above requirements, however, will force complainants to make specific allegations, thereby allowing defendants to raise specific defenses. Discovery disputes should be greatly curtailed and much less time wasted on other procedural matters.

#### IV. ANSWERS

The Commission makes two proposals regarding answers, which, taken together, place an unrealistic burden upon defendants. First, the Commission proposes to reduce the answer time from 30 to 20 days after service.<sup>12</sup> In conjunction with the proposed shortening of the answer period, the Commission also proposes that all answers include: (1) the name, address and telephone number of each individual likely to have discoverable information; and (2) a copy of, or a description by category, and location of all relevant documents, data compilations and tangible things in the possession, custody or control of the defendant.<sup>13</sup>

In many cases, it will be impossible for SWBT to provide a complete list of witnesses and documents within 20 days of service. Although the proposal appears equitable on its face -- requiring both complainants and defendants to attach lists of witnesses and documents to their complaints and answers -- the practicalities give an enormous advantage to complainants.

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<sup>12</sup> Id. at para. 47.

<sup>13</sup> Id. at para. 43.

Complainants have months or even years to prepare their initial pleading. Complainants can also choose the appropriate time to file their complaints. Defendants, on the other hand, in many cases do not even know that a complaint is going to be filed. Even when settlement discussions precede the filing of a formal complaint, defendants never know the actual date of filing.

Thus, the proposal that defendants be required to attach a complete witness list and a complete list of relevant documents to the answer, and that such answer be filed within 20 days of service, will, as a practical matter, encourage complainants to “game” the process by filing enormously complex complaints, thereby ensuring that defendants cannot possibly list all witnesses and all relevant documents. Complainants would then seek to exclude relevant facts from consideration, simply because defendants have not had time to list those facts in the answer.

For example, SWBT is currently defending formal complaints filed by AT&T, MCI and Sprint on the issue of carrier common line charges associated with Custom Calling Features. SWBT personnel have been forced to review many pages of archived records. Simply finding the locations of the records, in some cases, has proved an almost insurmountable difficulty. Other formal complaints against SWBT have posed similar difficulties. In the case of the above mentioned AT&T, MCI and Sprint formal complaints, SWBT could not possibly have attached a complete witness list and a list of all relevant documents within 20 days after service.

SWBT would not object to this proposal, however, if the Commission would make allowance for the modification of lists of witnesses and documents as the formal complaint proceeds. To expect a company as large as SWBT to provide a complete list of witnesses and documents within 20 days of service is unrealistic and would, SWBT believes, constitute a denial of due process.



## V. DISCOVERY

The Commission inquires whether it should prohibit discovery as a matter of right and leave it entirely within the discretion of the staff.<sup>14</sup> SWBT would support removing discovery entirely from the formal complaint procedure, as long as defendants have the right to remove any formal complaint to federal court. Under such a rule, both complainant and defendant would have the option of seeking relief in the federal court system, should complainant or defendant feel that formal discovery is necessary. Formal complaints would then be left to resolve matters in which discovery is unnecessary. SWBT believes this would be a proper use of the Commission's limited resources and would help ensure that the Commission can meet the statutory deadlines imposed by the Telecommunications Act of 1996.

SWBT would not support prohibiting discovery as a matter of right if the Commission would allow parties to file motions for discovery. Such a procedure would ensure that motions for discovery would be filed by virtually all complainants and all defendants in virtually all cases. This would be a certain recipe for delay.

SWBT would support a proposal in which complainants and defendants certify on the record that they have engaged in good faith discovery discussions prior to the filing of the formal complaint and have, in good faith, exchanged information reasonably necessary to the prosecution and defense of the complaint. Such certification would be made in addition to a certification that the parties have engaged in good faith settlement negotiations prior to the filing of the complaint.

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<sup>14</sup> Id. at para. 50.

Good faith discovery negotiations prior to the filing of a complaint would likely, in many cases, resolve all discovery disputes without intervention by the Commission staff. Such disputes would be limited to those cases involving legitimate disagreements.

The Commission inquires about a variety of proposals to limit the number of interrogatories and other discovery devices.<sup>15</sup> SWBT would not support these proposals, simply because they would embroil the staff in constant disputes as to the appropriate number of interrogatories or other discovery devices. The idea should be to eliminate discovery from the formal complaint process, either by requiring the parties to engage in discovery before the filing of the complaint, or else by prohibiting discovery entirely.

SWBT does support the proposal that discovery documents attached to complaints and answers be filed with the Commission.<sup>16</sup> Such documents will clearly be relevant to the decision of the case, and the Commission needs to have them. SWBT does not, however, support the proposal by which parties would attempt to agree among themselves to a discovery cost recovery system. It is SWBT's belief that parties to a formal complaint will rarely, if ever, be able to agree on how costs of discovery should be apportioned.

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<sup>15</sup> Id. at para. 51.

<sup>16</sup> Id. at para. 53.

SWBT does support the proposal to refer disputes over material facts to administrative law judges.<sup>17</sup> SWBT also supports the imposition of various sanctions for evasive or incomplete answers to interrogatories or other discovery.<sup>18</sup>

## VI. STATUS CONFERENCES

SWBT supports the proposal to hold a status conference in each formal complaint soon after the filing of the answer.<sup>19</sup> The proposed rule would set the conference 10 business days after filing, unless otherwise directed by the staff. As long as the staff is flexible, the rule should pose no problems, for there will obviously be occasions when all the parties may be available 11 or 12 days after the filing of the answer, rather than 10. Certainly, the spirit of the proposed rule is appropriate.

SWBT also supports the proposal that all parties in attendance at a status conference submit a joint order memorializing all oral rulings.<sup>20</sup> SWBT does not support the proposal to allow the parties to use a stenographer to transcribe oral presentations and exchanges at status conferences. Status conferences are, by definition, informal proceedings. The making of a formal record will prohibit the free flow of ideas that usually occurs at a status conference.

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<sup>17</sup> Id. at para. 56.

<sup>18</sup> Id. at para. 55.

<sup>19</sup> Id. at para. 58.

<sup>20</sup> Id. at para. 59.

## VII. CEASE AND DESIST ORDERS

SWBT does not support the Commission's tentative conclusion that Congress did not intend Section 312 hearings to apply in Section 208 and related complaint proceedings under Title II of the Act.<sup>21</sup> Section 312(c) requires the Commission to hold a show cause hearing prior to entering a cease and desist order. Section 312(b) indicates that the Commission may issue cease and desist orders for any failure "to observe any of the provisions of this Act [emphasis added]" or "any rule or regulation of the Commission authorized by this Act [emphasis added]." In short, Section 312 hearings apply to all alleged violations of the Communications Act and Commission rules. There is no justification for the Commission to dispense with Section 312 hearings in formal complaints brought pursuant to Section 208 of the Act, or pursuant to any other section of the Act.

SWBT does support the Commission's tentative conclusion that parties seeking cease and desist orders, or other interim relief, should be required to make the same showing which is necessary to support the issuance of a temporary restraining order: (1) likelihood of success on the merits; (2) the threat of irreparable harm absent the injunction; (3) no substantial injury to other parties; and (4) the furtherance of the public interest.<sup>22</sup>

SWBT does not believe that separate or specialized procedures are necessary for processing requests for cease and desist orders under Sections 260, 274 and 275. As mentioned above, all requests for cease and desist orders are governed by Section 312.

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<sup>21</sup> Id. at para. 60.

<sup>22</sup> Id. at para. 61.

## VIII. DAMAGES

The Commission has proposed several useful modifications of the formal complaint damages procedures. SWBT supports the proposed requirement that any complainant seeking an award of damages submit a detailed computation for damages with the original complaint.<sup>23</sup> Many formal complaints are a complete waste of the Commission's time, because the complainant's damages are highly speculative and not subject to proof. Requiring a detailed computation of damages in the initial complaint will stop such frivolous claims before they get started.

SWBT also supports bifurcating liability and damages issues in Section 208 proceedings.<sup>24</sup> The calculation of damages is often tedious and time consuming. In cases in which there is no liability, neither the defendant nor the Commission should waste time worrying over damages.

Because calculation of damages usually involves convoluted factual issues, SWBT would support the referring of damages issues to an administrative law judge. This procedure should be a matter of discretion with the Commission and should not be used in all cases. Similarly, SWBT would support a limited period, following a finding of liability, during which the parties can engage in settlement negotiations. If liability has been determined, the impetus for settlement obviously increases.

SWBT cannot support, however, the proposal that the Commission's adjudication of damages end with the determination of the sufficiency of the computation submitted by the

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<sup>23</sup> Id. at para. 66.

<sup>24</sup> Id. at para. 65.

complainant, rather than a finding of the exact amount of damages.<sup>25</sup> In any adversarial proceeding, the burden of proof must always be on the complaining party to prove damages. If the party cannot prove damages, then the party cannot recover. If the Commission rules only on the sufficiency of complainant's damages computation, without making a specific finding of damages, then the burden of proving damages has been lifted from the complainant. This, SWBT believes, would be a denial of due process to all defendants.

SWBT likewise cannot support the proposal to give the Commission discretion to require defendants to place a sum of money in an interest bearing escrow account, to cover part or all of the damages for which they may be found liable.<sup>26</sup> The Communications Act does not give the Commission authority to enter a money judgment against defendants. Under Section 407, the Commission only has authority to enter an order for the payment of money. If a defendant refuses to follow such order, the complainant's only recourse is to file a lawsuit in federal district court. Under Section 407: "Such suit in a district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suits the findings and order of the Commission shall be prima facie evidence of the facts therein stated." In a district court lawsuit to enforce a Commission order for the payment of money, therefore, the Commission's rulings are not even presumptively valid. They only allow the complainant to make a prima facie case and may be rebutted by any evidence which defendant may offer. Under the Communications Act, the

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<sup>25</sup> Id. at para. 66.

<sup>26</sup> Id. at para. 69.

Commission does not have the authority to enter money judgments and thus cannot order defendants to place money in an escrow bearing interest account.

IX. MOTIONS

SWBT supports the proposal to make failure to file an opposition to a motion possible grounds for granting the motion.<sup>27</sup> SWBT also supports the proposal to shorten the deadline for filing oppositions to motions from 10 to 5 business days, provided that the filing period be computed from the date of service of the motion on the opposing party.<sup>28</sup>

SWBT also supports the proposal to prohibit amendment of complaints, except for updates of supporting authority.<sup>29</sup>

X. CONFIDENTIAL OR PROPRIETARY INFORMATION

SWBT supports the proposal to allow parties to designate as proprietary any materials generated in the course of a formal complaint, as opposed to limiting such designation only to materials produced in response to discovery.<sup>30</sup> With the passage of the Telecommunications Act of 1996, and the resultant increase in competition among telecommunications carriers, protection of

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<sup>27</sup> Id. at para. 77.

<sup>28</sup> Id.

<sup>29</sup> Id. at para. 78.

<sup>30</sup> Id. at para. 79.

confidential information has become increasingly more important. SWBT supports all Commission efforts to limit unwarranted attempts of a competitor to secure another's confidential business data.

#### **XI. OTHER REQUIRED SUBMISSIONS**

SWBT supports the proposal to require the parties to submit a joint statement of stipulated facts and key legal issues 5 days after the answer is filed. Such a requirement will go far to eliminating the filing of frivolous complaints and will, SWBT believes, force complainants to eliminate, or at least drastically reduce, "fishing expeditions."

SWBT does not support the proposal to prohibit the filing of briefs in cases in which discovery is not conducted. SWBT believes that discovery should either be prohibited entirely in formal complaint proceedings, or else should be conducted by agreement of parties prior to the filing of the complaint. If either proposal is adopted, formal complaints would not involve discovery. The proposal to prohibit briefs in cases not involving discovery would thus deny the parties the opportunity to explore fully legal and factual issues. The Commission can limit the scope of briefs and require the filing of briefs shortly after the filing of an answer. Both would greatly speed the formal complaint process without, at the same time, denying the parties the right to fully argue their case.

The Commission could require, for example, the parties to file simultaneous briefs (of 20 pages or less) 30 days after the filing of the answer. Simultaneous replies (of 10 pages or less) could be filed 10 days after the filing of the initial briefs. Such a schedule would give the Commission ample time to enter a judgment within the newly imposed statutory deadlines.



## XII. SANCTIONS

Any new Commission rules should contain sanctions for the filing of frivolous formal complaints. As competition has increased, SWBT has found that formal complaints are being filed primarily to obtain, through discovery, confidential business information. This is a completely improper use of the Section 208 procedure. SWBT suggests that an appropriate sanction for an initial frivolous filing would be monetary forfeitures against the corporate claimant and a public reprimand of the attorney(s) filing the complaint. The filing of a second frivolous complaint should bring increased monetary forfeitures against the corporate complainant and suspension of the attorney(s) involved.

A complainant's failure to respond in good faith to an appropriate discovery request should bring a summary dismissal of the complaint.

## XIII. OTHER MATTERS

Section 271 (d)(6)(B) of the Telecommunications Act of 1996 requires the Commission to "act on" within 90 days complaints concerning alleged failures by Bell operating companies to meet the conditions required for in-region, interLATA services. The Commission tentatively concludes that the phrase "act on" does not require final action by the full Commission but rather requires only determinations by the Common Carrier Bureau whether a BOC has ceased to meet the conditions required for in-region, interLATA relief.<sup>31</sup> There is no justification for such an interpretation, and

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<sup>31</sup> Id. at para. 86.

SWBT does not support it. The whole point of Section 271 (d)(6)(B) is to avoid the “death by a thousand cuts” which adversaries of the BOCs have routinely attempted to administer through long and drawn out regulatory proceedings. Section 271 clearly requires the Commission to fully dispose of, within 90 days, all complaints that a BOC has ceased to meet the conditions required for in-region, interLATA relief. Similarly, Section 271 (d)(3) requires the Commission to “issue” within 90 days “a written determination” either approving or denying a Bell Operating Company’s request for in-region, interLATA relief. The full Commission must decide these matters within 90 days.

#### XIV. CONCLUSION

Abuse of discovery, more than anything else, causes inordinant delays in the processing of formal complaints. SWBT urges the Commission to seriously consider either prohibiting discovery entirely in formal complaints, or else requiring the parties to engage in self-executing discovery prior

to the filing of the complaint. The adoption of either of these proposals would go far to helping the Commission meet its statutory deadlines under the Telecommunications Act of 1996.

Respectfully submitted,

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January 6, 1997

CERTIFICATE OF SERVICE

I, Katie M. Turner, hereby certify that the foregoing, "Comments Of Southwestern Bell Telephone Company" in Docket No. 96-238 has been filed this 6th day of January, 1997 to the Parties of Record.

A handwritten signature in cursive script that reads "Katie M. Turner". The signature is written in black ink and is positioned above a horizontal line.

Katie M. Turner

January 6, 1997

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